No. 90-5721

(16)

In The

Supreme Court of the United States

October Term, 1990

PERVIS TYRONE PAYNE,

Petitioner,

v.

TENNESSEE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Tennessee

BRIEF OF *AMICI CURIAE* JUSTICE FOR ALL POLITICAL COMMITTEE, THE CONNECTICUT LEAGUE OF VICTIMS INC., EASTERN CONNECTICUT HOMICIDE SURVIVORS, SURVIVORS OF HOMICIDE, INC., STAMFORD SURVIVORS OF HOMICIDE, PARENTS OF MURDERED CHILDREN OF NEW YORK STATE, INC., LONG ISLAND CHAPTER OF PARENTS OF MURDERED CHILDREN AND OTHER SURVIVORS OF HOMICIDE VICTIMS, ALBANY (CAPITOL DISTRICT) CHAPTER OF PARENTS OF MURDERED CHILDREN AND OTHER SURVIVORS OF HOMICIDE VICTIMS, SIBLING SUPPORT AND ACTION GROUP, HOMICIDE CRISIS OUTREACH PROGRAM, AND THE STEPHANIE ROPER COMMITTEE, INC., IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Amendment to the United States Constitution prohibits any form of victim impact evidence to be considered at a capital sentencing hearing?

2. Whether the court should overrule its decision in *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 109 S. Ct. 2207 (1989) and permit a capital sentencing body to consider some forms of victim impact evidence in reaching its determination?

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BRIEF OF AMICI CURIAE

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Justice for All Political Committee is a Connecticut political action committee which advocates legislative change to increase victim participation in the criminal justice system. Its chairman, Paul Griffith Garland, is the father of a murdered daughter. He also is the chairman of the Crime Victims' Rights Committee of the Connecticut Bar Association.

The Connecticut League of Victims Inc. is a non-profit corporation whose activities include the operation of a homicide survivors group whose meetings are held

in Bridgeport, Connecticut. Its president, David Kniffin, is the father of a murdered son.

Eastern Connecticut Homicide Survivors is a unincorporated association of homicide survivors, whose meetings are held in Norwich, Connecticut. Its president, Greg Vickers, is the father of a murdered daughter.

Survivors of Homicide, Inc. is a not for profit corporation whose activities include the operation of a homicide survivors group in Hartford, Connecticut. Its president, Gary Merton, is the father of a murdered daughter.

Stamford Survivors of Homicide is an unincorporated association of homicide survivors, whose meetings are held in Stamford, Connecticut. Its chairperson, Stuart Brush, is the father of a murdered son.

Parent of Murdered Children of New York State Inc. is a non-profit corporation whose activities include the operation of the Queens County Bereavement Group, the Bronx County Bereavement Group, and the Staten Island Bereavement Group. Its State Coordinator, Ralph Hubbard, is the father of a murdered son.

Long Island Chapter of Parents of Murdered Children and Other Survivors of Homicide Victims is an unincorporated association of homicide victims, whose meetings are held on Long Island, New York. Its president, Barbara Connelly, is the mother of a murdered son.

Albany (Capitol District) Chapter of Parents of Murdered Children and Other Survivors of Homicide Victims is an unincorporated association of homicide victims, whose meetings are held in the Albany, New York, area.

Its president, Patricia M. Gioia, is the mother of a murdered daughter.

Sibling Support and Action Group is an unincorporated association of siblings who are homicide survivors, whose meetings are held on Long Island, New York. Its president, Kathleen Takhes, is the sister of a murdered brother.

Homicide Crisis Outreach Program, based in White Plains, New York, is a division of Westchester Community Opportunity Program Inc., a non-profit corporation. Its coordinator, Marianne Walsh, is the daughter of a murdered father.

The Stephanie Roper Committee, Inc., which appeared as *amicus* in *South Carolina v. Gathers* and *Booth v. Maryland*, is a non-profit corporation based in Upper Marlboro, Maryland, which dedicates itself to the improvement of the standing of crime victims. Its president, Roberta Roper, is the mother of a murdered daughter.

INTRODUCTION AND SUMMARY OF ARGUMENT

Murder is the ultimate act of depersonalization. The murderer turns a sentient being into a corpse, to be remembered at the murder trial by a series of grisly relics: the police photographs, the bloody shirt, the dark stain on the carpet. The crime silences the victim. This Court's unfortunate decisions in *Booth v. Maryland*, 107 S.Ct. 2529 (1987) and *Gathers v. South Carolina*, 109 S.Ct. 2207 (1989)

effectively silence those most capable of articulating the full consequences of the murderer's act: the survivors.

Payne v. Tennessee offers this Court the opportunity to rectify the injustice to crime victims wrought by the decisions of a narrow majority of this Court in *Booth* and *Gathers*. As the facts of *Payne* so poignantly demonstrate, the survivors of a capital crime are themselves victims. They may suffer from depression, anger, or post traumatic stress disorders. They may become dependent on drugs and alcohol. They may become alienated from spouses and siblings. The emotional, physical, and financial consequences they suffer are circumstances of the crime that are properly considered in the sentencing phase of capital, as well as non-capital cases. By unreasonably establishing a per se exclusionary rule for victim impact evidence, *Booth* and *Gathers* make it impossible for the sentencing body to weigh and consider the full impact of a capital crime on society.

The United States Constitution does not require the disenfranchisement of victims of capital crimes. Nor does it require that a sentencing body remain ignorant of the personal characteristics of a deceased victim. A capital sentencing body is entitled, if not obligated, to consider the impact of the crime upon its victims. *Amici* join in urging this Court to overrule *Booth* and *Gathers*.

ARGUMENT

I. CONTRARY TO THE MAJORITY HOLDINGS IN *BOOTH V. MARYLAND* AND *GATHERS V. SOUTH CAROLINA*, CONSIDERATION OF VICTIM IMPACT EVIDENCE AT A CAPITAL SENTENCING HEARING, WITH PROPER CONSTRAINTS, DOES NOT TAINT THE FAIRNESS OF THE PROCEEDING.

The majority's decision in *Booth* and *Gathers* proceed from an analytical framework that ignores victim's rights. Under *Booth* and *Gathers*, the only individual rights that deserve consideration at a capital sentencing hearing are those of the defendant. The majority opinions in these cases stress that the capital defendant must be treated as a " 'uniquely individual human bein[g].' " *Booth*, 107 S.Ct. at 2533, quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). By contrast, victim impact evidence is "irrelevant to the decision to kill," and "could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime." *Id.* at 2534. Under *Booth* and *Gathers*, the rights of crime victims either do not exist, or do not matter, in the context of capital sentencing.

Amici curiae respectfully submit that the majority in *Booth* and *Gathers* erred in concluding that the only individual rights worthy of considering in capital sentencing are those of the defendant. Victim participation at capital sentencing hearings is not antithetical to the atmosphere of fairness and impartiality that must be maintained in this forum. Nor does giving the trier of fact a "glimpse of the life that [the defendant] chose to extinguish" divert attention from the ultimate question of the defendant's

culpability. *Mills v. Maryland*, 108 S.Ct. 1860, 1876 (1987) (Rehnquist, C.J., dissenting). To the contrary, victim impact evidence provides the sentencer with valuable insight into the impact of the crime on the segment of society most directly and viscerally affected by it: the victim's family and loved ones. This additional insight, absent in a purely defendant-oriented inquiry, permits the sentencing tribunal to make an informed and enlightened decision as to whether the "circumstances of the crime" merit the ultimate penalty of death.

The fault of the majority opinions in *Booth* and *Gathers* lies not in their solicitous concern for the procedural rights of criminal defendants at capital sentencing hearings. This Court has always recognized that cases involving the possibility of the death penalty are different in kind, as well as degree, from non-capital cases. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (plurality opinion). Similarly justifiable is the Court's concern that a capital sentencing hearing not be tainted by inflammatory, prejudicial testimony from the victim's survivors. "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life shall be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

The majority in *Booth* and *Gathers* errs, however, in concluding that because it is *possible* that victim impact evidence may taint the necessary atmosphere of fairness at capital sentencing hearings, all victim impact evidence

must be excluded from such hearings as a matter of constitutional law. Certainly inflammatory victim impact evidence has no place at a capital sentencing hearing. The *Booth* majority was justifiably concerned about the prejudicial impact of the victim's son's testimony before the capital sentencing jury that he " '[didn't] think anyone should be able to do something like [the murder of his parents] and get away with it,' " and the victim's daughter's expression of her view that the defendant " 'could [never] be rehabilitated.' " *Id.* at 2535, 2536.

Assuring fairness to the convicted capital felon, however, does not require that the representatives of the felon's victim be muzzled. Victim impact evidence is bound to be emotionally powerful; it is unrealistic to expect the survivors of capital crimes to be bland and dispassionate in describing their losses. This Court has recognized a distinction, however, between evidence at a capital sentencing hearing that is *calculated* to evoke a purely emotional response, and proper evidence of mitigating and aggravating circumstances that may incidentally provoke emotional reactions. *See California v. Brown*, 107 S.Ct. 837, 840 (1987). The Court has recognized that a capital sentencing body is not only entitled, but constitutionally required, to consider evidence introduced on a defendant's behalf of "*compassionate* or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (emphasis added); *California v. Brown*, 107 S.Ct. 837, 843 (1987) (Brennan, J., dissenting). Just as mitigating factors such as the defendant's youth or troubled family background may arouse a sentencer's compassion, aggravating factors, such as the physical brutality of the crime or

the age of the victim, may arouse revulsion. In neither case does the likelihood of an incidental emotional reaction impermissibly taint the sentencing proceeding.

Victim impact evidence, like other evidence introduced at a capital sentencing hearing, deserves close judicial scrutiny to assure that a death sentence is not imposed out of "whim, passion, prejudice or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). But the need for parameters on the nature and scope of victim impact evidence does not justify the *per se* constitutional ban imposed on such evidence by the majority in *Booth* and *Gathers*. In order to make a "reasoned *moral* response" to the defendant's crime; *California v. Brown*, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring); the capital sentencing body should be afforded "a glimpse of the life that [the defendant] chose to extinguish." *Mills v. Maryland*, 108 S. Ct. 1860, 1876 (1987) (Rehnquist, C.J., dissenting).

II. THE MAJORITY OPINIONS IN *BOOTH* AND *GATHERS* LACK CONSTITUTIONAL FOUNDATION AND USURP THE POLICY-MAKING FUNCTIONS OF THE LEGISLATURE.

Nothing in the text of the Eighth Amendment supports a constitutional ban on victim impact evidence at capital sentencing hearings. Until *Booth*, Eighth Amendment jurisprudence had never required or even supported such a result. As Justice O'Connor stated forcefully in the dissenting opinion in *Gathers*, "*Booth* has not even an arguable basis in the common law background that led up to the Eighth Amendment, in any longstanding societal tradition, or in any evidence that

present society, though its laws or the actions of its juries, has set its face against considering the harm caused by criminal acts in assessing responsibility." *Id.* at 2218 (O'Connor, J., dissenting). In other words, *Booth* and *Gathers* represent judicial policy making cloaked in the mantle of a constitutional mandate.

This Court has recognized that the criminal judicial process must respect the interests of crime victims. *Morris v. Slappy*, 461 U.S. 1, 14 (1983); *Furman v. Georgia*, 408 U.S. 238, 413-14 (1972) (Powell, J., dissenting). It has also frequently recognized that "determinations of appropriate sentencing considerations are 'peculiarly questions of legislative policy.'" *Booth v. Maryland*, 107 S.Ct. 2529, 2539 (1987) (White, J., dissenting), quoting *Gore v. United States*, 357 U.S. 386, 393 (1958). Legislatures across the nation have recognized the rights of crime victims to participate in criminal sentencing. *Nova Legislative Directory*, National Organization for Victim Assistance, Washington, D.C. (1988). The national legislative trend favoring the admission of victim impact evidence at capital sentencing hearings, subject to statutorily-imposed parameters, reflects a considered judgment that such evidence furthers the valid penological goals of deterrence and retribution. *See* generally *Gregg v. Georgia*, 428 U.S. 153 (1976).

Capital sentencing is more than a referendum on the personal characteristics of the defendant. Properly constituted, it is an expression of the community's judgment on the extent to which the action of the criminal has so harmed his community that the ultimate sanction of death is warranted. The *Booth* majority acknowledged that in a capital case, "it is the function of the sentencing

jury to 'express the conscience of the community on the ultimate question of life or death.' " *Booth v. Maryland*, 107 S.Ct. 2529 at 2533, quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg v. Georgia*, 428 U.S. 153, 184 (1976).

If, as the Court has recognized, the sentencing body is the conduit for the community's response to a capital crime, those members of the community most personally and directly affected by the crime ought not to be silenced at the capital sentencing hearing. The will of the community, as expressed through its legislative bodies, is that victims' survivors should be afforded an opportunity to be heard, in some fashion, at capital sentencing hearings. This Court has the ultimate obligation to assure that the introduction of victim impact evidence does not taint the fundamental fairness of the capital sentencing hearing. In doing so, however, it should limit itself to case-by-case review, rather than proscribing any form of victim impact evidence in the context of capital sentencing.

III. CONSISTENT WITH THIS COURT'S EIGHTH AMENDMENT JURISPRUDENCE, A CRIMINAL DEFENDANT AT CAPITAL SENTENCING SHOULD BE HELD ACCOUNTABLE FOR ALL OF THE CIRCUMSTANCES OF HIS OFFENSE, INCLUDING ITS IMPACT ON VICTIMS.

Fundamental fairness requires that the sentencing body in capital cases take into account "the circumstances

of the offense together with the character and propensities of the offender." *Pennsylvania v. Ashe*, 302 U.S. 51, 55 (1937); *Eddings v. Oklahoma*, 455 U.S. 104, 111-12 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). In applying this principle, this Court has frequently focused on the second half of this phrase: "the character and propensities of the offender." The jurisprudential rule that has evolved is that any aspect of the defendant's character or personal circumstances offered in mitigation of his crime is required to be admitted at the capital sentencing hearing. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 604 (1977).

Unfortunately, this Court has offered scant exegesis on what constitutes a "circumstance of the offense" relevant to capital sentencing. It is clear that a capital sentencing body may properly consider aggravating, as well as mitigating circumstances of the offense in deciding whether to impose the death penalty. *Zant v. Stephens*, 462 U.S. 862, 874-75 (1982). Until *Booth*, this Court had never held that as a matter of constitutional law a state legislature could not, "if it chooses, include as a sentencing consideration the particularized harm that an individual's murder causes to the rest of society and in particular to his family." *Booth v. Maryland*, 107 S.Ct. 2529 at 2540 (1987) (O'Connor, J., dissenting). Certainly this harm is not so tenuous or remote that its consideration in sentencing is impermissible as a matter of constitutional law.

The *Booth* majority's rationale for excluding victim impact evidence is that such evidence has no bearing on the defendant's " 'personal responsibility and moral guilt.' " *Id.* at 2533, quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982). In making this determination, the majority improperly establishes itself as an arbiter of national

moral standards. The legislative consensus in favor of allowing victim impact evidence to be admitted at sentencing shows that the view of the community, whom the sentencing body represents, is that a criminal defendant does indeed bear "personal responsibility" for the consequences his crime inflicts on victim and victims' survivors.

The *Booth* majority's concept of what bears on a defendant's "moral guilt" is unconscionably narrow. According to the majority, only those factors relevant to "the decision to kill" reflect on blameworthiness. *Id.* at 2534. The *Booth* majority further notes that "defendants rarely select their victims based on whether the murder will have an effect on anyone other than the person murdered." *Id.* While this may be true, should the fact that a killer has no regard for the suffering his act may inflict on the family and loved ones of his victim absolve him from "moral guilt" for these consequences? The *Booth* majority's conception of morality unwittingly condones amorality.

The national consensus in favor of allowing victim input in capital sentencing decisions reflects the moral judgment of society, contrary to that of the *Booth* majority, that people who kill other people should be held morally responsible for the effects of their actions on the victim's survivors. This moral judgment is neither arbitrary nor unreasonable, and should not be overruled by judicial fiat.

IV. THE TEST OF "BLAMEWORTHINESS" SET FORTH IN *BOOTH* AND *GATHERS* IS AMBIGUOUS, AND ITS APPLICATION IMPAIRS THE VALUES OF CERTAINTY AND PREDICTABILITY IN CAPITAL SENTENCING.

In dismissing the argument that the impact of a capital crime on a victim's survivors is indeed a "circumstance of the offense," the *Booth* majority failed to anticipate fact situations such as those in the present case. Here, the victim impact information showed the effect of the crime on a three year old boy who was in the same room where his mother and sister were murdered, and who was himself assaulted in the same attack. As the South Carolina Supreme Court aptly noted:

> When a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight year old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room, the physical and mental condition of the boy he left for dead is surely relevant in determining his "blameworthiness."

State v. Payne, 791 S.W.2d 10, 19 (1990).

Because *Booth* and *Gathers* turn on the murky philosophical concept of a defendant's moral blameworthiness, they impair the values of certainty and predictability, values which the defendant and the community have an interest in maintaining in the context of capital sentencing. *Furman v. Georgia*, 408 U.S. 283 (1972). It is not difficult to imagine variations on the facts presented to the Court in this case that would confound philosophers, as well as judges, seeking to evaluate the extent to which

a murderer could be held morally culpable for the consequences on his victim's survivors. For example, what if the son had not witnessed his mother's and sister's murders, but had been depicted in a family photograph prominently displayed at the murder scene? Is the defendant morally responsible for the impact of the murders on the child, thus making such impact evidence admissible at a capital sentencing hearing? Would "moral guilt" depend on the prosecution's proof that the defendant actually saw the photograph?

Unfortunately, the admissibility of victim impact evidence now depends on the answers to impossibly close questions such as these. In *Gathers*, the majority found significant the absence of evidence that the defendant had read the religious tracts that his murder victim had carried, noting, among other things, that the defendant did not have a flashlight when he attacked the victim in a dark, wooded area. *Id.* at 2211.

The practical difficulty in defining the scope of "moral guilt" illustrates the fallacy of adjudicating questions of morality. Morality is an issue of public policy, not jurisprudence. The mandate of public policy is that crime victims should be heard at capital sentencing hearings. *Amici* urge the Court to uphold that mandate by overruling *Booth* and *Gathers*.

CONCLUSION

The reality of violent death is discomforting. But for capital sentencing to meaningfully reflect the conscience of society, the full reality of violent death must be

explored. The impact of a capital crime on its victims, and its victims' relatives and loved ones, is as much a circumstance of the crime, if not more so, than the psychological and social factors that the defendant may claim militate against a sentence of death. To ignore victim impact evidence in capital sentencing is to ignore the truth about capital crime. *Amici* join in respectfully requesting the Court to restore truth and fairness to capital sentencing proceedings by allowing the consideration of victim impact evidence.

Respectfully submitted,

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